IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.10.2006

Coram :

THE HONOURABLE MR.JUSTICE R.BALASUBRAMANIAN

AND

THE HONOURABLE MR.JUSTICE P.P.S.JANARTHANA RAJA

Tax Case (Appeal) No.2265 of 2006

The Commissioner of Income Tax
Chennai ..Appellant

-Vs.-

M/s.Tamilnadu Warehousing Corprn.
100,Anna Salai
Guindy
Chennai-32. ..Respondent

Appeal under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras, 'B' Bench dated 25.11.2005 in I.T.A. No.1171/Mds/1994 for the assessment year 1989-90.(C. NO. 218-II/12/93-94 dated 3.2.1994 on the file of the Commissioner of Income Tax Tamil Nadu I, Madras - 34 ITA NO. 487/91-92 DATED 4.8.1992 on the file of the Commissioner of Income Tax (Appeals) V Chennai against PAN/GIR NO. 47-004-CZ-7893/9-J dated 31.1.1992 on the file of the Deputy Commissioner Special Range I, Chennai

For Appellant : Mrs.Pushya Sitaraman

JUDGMENT

(Judgment of the Court was delivered by
P.P.S.Janarthana Raja, J.)

This appeal is filed by the Revenue under Section 260A of the Income Tax Act, 1961 in I.T.A. No.1771/Mds/1994, passed by the Income Tax Appellate Tribunal, Madras, 'B' Bench raising the following substantial questions of law.

"(i) Whether in the facts and circumstances of the case the Tribunal was

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right in quashing the order passed under Section 263 on the ground that the Commissioner of Income Tax had not stated in his order as to how the assessment order was erroneous and prejudicial to the interest of the revenue?

(ii) Whether in the facts and circumstances of the case the Tribunal was right in looking at the form of the Commissioner's order of revision rather than the substance of the same?

2. The brief facts leading to the above questions of law are as under:

The assessee is a company in which the public are substantially interested. The relevant assessment year is 1989-90 and the corresponding accounting year ended on 31.03.1989. The assessee company derives income from the following sources:-

(i) Warehousing charges
(ii) Supervision charges
(iii) Fumigation charges
(iv) Weigh bridge receipts
(v) Income from other sources, such as interest from deposits, sale of tender forms.
(vi) Rent received from staff quarters.

The assessee filed Return of income for the assessment year 1989-90 on 26.12.1989 as Nil income. Later, the assessee filed revised Return on 15.11.1991 returning Nil income. The revised Return was filed beyond the time limit prescribed under the Act. The same was ignored by the Assessing Officer and the assessment was completed under Section 143(3) of the Income-tax Act (hereinafter referred to as the "Act") on 21.01.1992 and determined the total income at Rs.13,14,679/-. The assessee surrendered the Group Gratuity Scheme with LIC and received a sum of Rs.8,22,925/- during the year relevant to the assessment year 1989-90. As there was no proper enquiry made by the Assessing Officer in the assessment completed on 21.01.1992, the Commissioner of Income-tax passed order under Section 263 of the Act and set aside the assessment, with a direction to the Assessing Officer to assess the said amount under Section 41(1) of the Act for the assessment year 1989-90. Aggrieved by the order, the assessee filed an appeal before the Income Tax Appellate Tribunal (hereinafter referred to as the "Tribunal"). The Tribunal allowed the appeal and set aside the order of the Commissioner of Income-tax.

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3. Learned Standing Counsel appearing for the Revenue submitted that no enquiry made by the Assessing Officer in respect of the assessability of the amount received by the assessee from Group Gratuity Scheme with LIC and hence the said order of assessment is erroneous and also prejudicial to the interest of the Revenue. When both the conditions are satisfied, the Commissioner is right in invoking the provisions of Section 263 of the Act. Hence the order of the Tribunal is wrong, illegal, without basis and justification.

4. Heard the counsel. Section 263 of the Act which is relevant for the purpose, reads as under:

> "263. Revision of orders prejudicial to Revenue - (1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the Revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment."

Supreme Court judgment reported in 243 ITR 83 in the case of Malabar Industrial Co. Ltd. Vs. Commissioner of Income-tax, considered the scope of the above provision and held as follows:

> "A bare reading of this provision makes it clear that the prerequisite to the exercise of jurisdiction by the Commissioner suo motu under it, is that the order of the Income-tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue. The Commissioner has to be satisfied of twin conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If one of them is absent - if the order of the Income-tax Officer is erroneous but is not prejudicial to the Revenue or if it is not erroneous but is prejudicial to the Revenue - recourse cannot be had to section 263(1) of the Act.

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> There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer, it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind."

The Tribunal correctly followed the above principles of the Supreme Court and held as follows:

> "For the purpose of invoking provisions of sec.263, twin conditions i.e. (i) that assessment order was erroneous and (ii) it was prejudicial to the interests of Revenue, are to be satisfied. There is no finding of the fact as to what extent amount was claimed as deduction in a particular assessment. The assessee has admitted the amount of Rs.8,22,925/- as liability in the balance sheet. Merely because the amount was not examined by the AO for the purposes of income tax cannot be a condition for cancellation of the assessment order u/s 263 of the Act. A positive finding has to be recorded by the CIT that the assessment order was erroneous as well as prejudicial to the interests of the Revenue while invoking the provisions of sec.263 of the Act. In this case the ld. CIT has not given a finding as to how the order was erroneous and prejudicial to the interests of Revenue. Therefore, twin conditions necessary for invoking provisions of sec.263 are not satisfied. Such an order has no legs to stand and deserves to be quashed. We accordingly cancel the order passed u/s 263 of the Act and restore the assessment order passed by the A.O."

From a reading of the above reasoning of the Tribunal, it is clear that the assessee has continued to show the admitted amount of Rs.8,22,925/- as liability in the balance sheet. The undisputed fact is that it is a liability reflected in the balance sheet. Once it is shown as liability by the assessee, the CIT is wrong in

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holding that the same is assessable under Section 41(1) of the Act. Unless and until there is a cessation of liability, Section 41 will not be pressed into service.

5. In view of the foregoing reasons, we find the reasoning by the Tribunal was based on valid materials and evidence and hence there is no error or legal infirmity in the order of the Tribunal so as to warrant interference. Hence, no substantial questions of law arise for consideration of this Court and the tax case is dismissed. No costs.

Tr/km

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The Assistant Registrar
   Income Tax Appellate Tribunal
   Rajaji Bhavan, Besant Nagar
   Chennai-600 090.

2. The Commissioner of Income Tax (Appeals)V
   121, Mahatma Gandhi Road, Chennai-600 034.

3. The Commissioner of Income Tax Tamil Nadu- I
Chennai - 34

4. The Deputy Commissioner of Income Tax
   Spl.Range I, Madras.

JRG(CO)
NM(31.10.2006)

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